Salconmas Sdn Bhd v Ketua Setiausaha Kementerian Dalam Negeri & Anor

HIGH COURT (KANGAR) — ORIGINATING SUMMONS NO RA-24C(ARB)-2–07 OF 2020
ARIK SANUSI JC
30 NOVEMBER 2020

Civil Procedure — Stay of proceedings — Special circumstances — Plaintiff obtained final arbitration award — Defendants' application to set aside arbitration award partly dismissed by High Court — Defendants appealed against High Court's decision — Plaintiff filed application pursuant to s 38 of the Arbitration Act 2005 ('the AA') — Defendants filed application for interim stay of proceeding pending appeal — Whether High Court could exercise power and jurisdiction under ss 43 and 73 of the Courts of Judicature Act 1964 read together with O 45 r 11 of the Rules of Court 2012 to grant interim stay of proceeding against application for recognition and enforcement of arbitration award under s 38 of the AA — Whether special circumstances existed to warrant defendants' application for stay of proceeding — Arbitration Act 2005 ss 8 & 38 — Courts of Judicature Act 1964 ss 3, 43 & 73 — Rules of Court 2012 O 45 r 11

The plaintiff had obtained final arbitration award amounting to RM145,730,780 against the defendants ('the arbitration award'). Dissatisfied with the arbitration award, the defendants filed an application to set aside the arbitration award, but the High Court had partly dismissed the said application ('the High Court's order'). Pending the defendants' appeal to the Court of Appeal, the plaintiff had filed an originating summons ('the OS') pursuant to s 38 of the Arbitration Act 2005 ('the AA') for the arbitration award be registered as a judgment of the High Court, for the recognition and enforcement of the award against the defendants ('encl 1'). In response to the OS, the defendants filed the present application for an interim stay of proceeding against the plaintiff's OS ('encl 4'). In support of encl 4, the defendants filed affidavit in support ('encl 4A') which laid down the special circumstances warranting stay of proceeding. The issues raised in the present application were: (a) whether the High Court could exercise its power and jurisdiction under ss 43 and 73 of the Courts of Judicature Act 1964 ('the CJA') read together with O 45 r 11 of the Rules of Court 2012 ('the ROC') to grant an interim stay of proceeding against an application for the recognition and enforcement of an arbitration award under s 38 of the AA ('the first issue'); and (b) whether the special circumstances existed to warrant the defendants' application for a stay of proceeding ('the second issue'). In respect of the first issue, the plaintiff submitted that according to s 8 of the AA, the court shall not intervene in matters governed by the AA except with regard to ss 10, 11, 13(7),

15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45 and 46 of the Act. A

Held, allowing encl 4 with no order as to costs:

(1) The plaintiff's application in encl 1 was not subject to the arbitration proceeding and governed by the AA but was a matter that was subject to the court 'proceeding' and governed by the CJA. By filing the application in this court, encls 1 and 4 would fall within the meaning of 'proceeding' under s 3 of the CJA. Hence, this court would assume jurisdiction over the matters. Further, since encl 4 was against the High Court's order which formed the basis of encl 1, which was pending before the Court of Appeal, ss 43 and 73 of the CJA read together with O 45 r 11 of the ROC clearly grant the power and jurisdiction to the court to hear encl 4. In addition, according to s 73 of the CJA, the court had an absolute and unfettered discretion to grant or to refuse the defendants' stay application against encl 1, but the discretion ought to be exercised in accordance with the established judicial principles. Based on the above findings, the court answered the first issue in the affirmative (see paras 36–38 & 43–44). B C D

(2) Based on decided cases, it was plain and clear that in granting or refusing the stay application, the court had to consider among others, the factors of special circumstances and an appeal would be rendered nugatory if the stay was refused (see para 61). E

(3) The court answered the second issue in the affirmative. The defendants had successfully shown the special circumstances in their affidavit in support to justify the stay of proceeding, which were as followed: (a) the defendants had filed an appeal against the High Court's order; (b) the defendants' appeal was now pending before the Court of Appeal; (c) the appeal would be rendered nugatory, if the stay was refused and the defendants' appeal was successful; (d) there were numerous legal issues arising from the arbitrator's final award that require the determination of the Court of Appeal; (e) the amount of the final award which was exceeding RM145m will be paid out from the public coffers and it would cost the Government much resources and time to recover the final award from the plaintiff should the plaintiff lose in the appeal; (f) stay of execution of the order was of paramount public importance so as not to render the defendants' appeal nugatory; and (g) the stay application was in the public interest as the amount involved was very large (see paras 62 & 64). F G H

[Bahasa Malaysia summary I

Plaintif telah memperolehi award akhir timbang tara berjumlah RM145,730,780 terhadap defendan ('award timbang tara'). Tidak berpuas hati dengan award timbang tara tersebut, defendan-defendan memfailkan permohonan untuk mengenepikan award timbang tara tersebut, tetapi

Mahkamah Tinggi telah menolak sebahagian permohonan tersebut ('perintah Mahkamah Tinggi'). Sementara menunggu rayuan defendan-defendan ke Mahkamah Rayuan, plaintif telah memfailkan saman pemula ('OS') berdasarkan s 38 Akta Timbang Tara 2005 ('AT tersebut') agar award timbang tara didaftarkan sebagai keputusan Mahkamah Tinggi, untuk pengiktirafan dan penguatkuasaan award tersebut terhadap defendan-defendan ('lampiran 1'). Sebagai tindak balas terhadap OS tersebut, defendan-defendan memfailkan permohonan semasa untuk penangguhan sementara prosiding terhadap OS plaintif ('lampiran 4'). Sebagai sokongan kepada lampiran 4, defendan-defendan mengemukakan afidavit sokongan ('lampiran 4A') yang menyatakan keadaan khas yang menjamin penangguhan prosiding. Isu-isu yang dibangkitkan dalam permohonan ini adalah: (a) sama ada Mahkamah Tinggi boleh menggunakan kuasa dan bidang kuasanya di bawah ss 43 dan 73 Akta Mahkamah Kehakiman 1964 ('AMK tersebut') yang dibaca bersama dengan A 45 k 11 Kaedah-Kaedah Mahkamah 2012 ('KKM tersebut') untuk memberikan penangguhan sementara terhadap permohonan pengiktirafan dan penguatkuasaan award timbang tara di bawah s 38 AT tersebut ('isu pertama'); dan (b) sama ada keadaan khas wujud untuk menjamin permohonan defendan-defendan untuk menangguhkan prosiding ('isu kedua'). Berkaitan dengan isu pertama, plaintif berhujah bahawa menurut s 8 AT tersebut, mahkamah tidak boleh campur tangan dalam hal-hal yang dikawal selia oleh AT tersebut kecuali berkenaan dengan ss 10, 11, 13(7), 15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45 dan 46 Akta tersebut.

Diputuskan, membenarkan lampiran 4 tanpa perintah berkenaan kos:

(1) Permohonan plaintif dalam lampiran 1 tidak tertakluk kepada prosiding timbang tara dan dikawal selia oleh AT tersebut tetapi merupakan suatu perkara yang tertakluk kepada 'prosiding' mahkamah dan dikawal selia oleh AMK tersebut. Dengan memfailkan permohonan di mahkamah ini, lampiran 1 dan 4 akan termasuk dalam maksud 'prosiding' di bawah s 3 AMK tersebut. Oleh itu, mahkamah ini mempunyai bidang kuasa atas perkara-perkara tersebut. Selanjutnya, memandangkan lampiran 4 difailkan terhadap perintah Mahkamah Tinggi yang menjadi dasar kepada lampiran 1, yang menunggu keputusan di Mahkamah Rayuan, ss 43 dan 73 AMK tersebut dibaca bersama dengan A 45 k 11 KKM tersebut dengan jelas memberikan kuasa dan bidang kuasa kepada mahkamah untuk mendengar lampiran 4. Selain itu, menurut s 73 AMK tersebut, mahkamah memiliki budi bicara mutlak dan tidak terbatas untuk memberikan atau menolak permohonan penangguhan defendan-defendan terhadap lampiran 1, tetapi budi bicara tersebut harus dilaksanakan bersesuaian dengan prinsip kehakiman yang ditetapkan. Berdasarkan dapatan-dapatan di atas, mahkamah menjawab isu pertama secara afirmatif (lihat perenggan 36–38 & 43–44).

(2) Berdasarkan kes-kes yang telah diputuskan, adalah terang dan jelas

bahawa dalam membenarkan atau menolak permohonan penangguhan, mahkamah harus mempertimbangkan antara lain, faktor-faktor keadaan khas dan rayuan yang akan menjadi tidak berguna jika penangguhan tersebut ditolak (lihat perenggan 61).

(3) Mahkamah menjawab isu kedua secara afirmatif. Defendan-defendan telah berjaya menunjukkan keadaan khas dalam afidavit sokongan mereka untuk menyokong penangguhan prosiding, seperti berikut: (a) defendan-defendan telah memfailkan rayuan terhadap perintah Mahkamah Tinggi; (b) rayuan defendan-defendan kini masih tertangguh di Mahkamah Rayuan; (c) rayuan akan dianggap tidak berguna, jika penangguhan tersebut ditolak dan rayuan defendan-defendan berjaya; (d) terdapat banyak isu undang-undang yang timbul dari award akhir timbang tara yang memerlukan penentuan Mahkamah Rayuan; (e) jumlah award akhir yang melebihi RM145 juta akan dibayar dari sumber kewangan awam dan banyak sumber dan masa Kerajaan diperlukan untuk mendapatkan semula award akhir tersebut dari pihak plaintif sekiranya pihak plaintif kalah dalam rayuan; (f) penangguhan pelaksanaan perintah tersebut sangat penting bagi orang awam bagi memastikan rayuan defendan-defendan tidak menjadi tidak berguna; dan (g) permohonan penangguhan adalah untuk kepentingan awam kerana jumlah yang terlibat sangat besar (lihat perenggan 62 & 64).]

Cases referred to

All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v Punca Klasik Sdn Bhd [1996] 4 MLJ 533; [1998] 5 CLJ 49, HC (refd)

Che Wan Development Sdn Bhd v Co-Operative Central Bank Bhd [1989] 3 MLJ 40, HC (refd)

Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1, FC (distd)

Gentali (M) Sdn Bhd lwn Kawasaki Sunrock Sdn Bhd [1996] 3 MLJ 597, CA (refd)

Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213, CA (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)

Leong Poh Shee v Ng Kat Chong [1966] 1 MLJ 86 (refd)

Malaysian Bio-Xcell Sdn Bhd v Lebas Technologies Sdn Bhd [2020] 3 MLJ 723, CA (distd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49; [2002] 3 CLJ 380 (refd)

Ong Koh Hou v Da Land Sdn Bhd & Ors [2018] MLJU 778; [2019] 4 CLJ 622, CA (refd)

A *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697, CA (refd)
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417, FC (refd)
Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin [2000] 5 MLJ 391; [1999] 8 CLJ 534, HC (refd)
B *See Teow Guan v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598, CA (refd)
Serangoon Garden Estate Ltd v Ang Keng [1953] 1 MLJ 116 (refd)
Syarikat Berpakat v Lim Kai Kok [1983] 1 MLJ 406 (refd)
C *The 'Yih Shen': Lai Lai Yin v MV 'Yih Shen', Owners Of And Other Persons Interested* [1986] 2 MLJ 65 (refd)
Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor [2015] 7 MLJ 305, HC (refd)
Wilson v Church (No 2) (1879) 12 Ch D 454 (refd)

D **Legislation referred to**

Arbitration Award 2005 ss 8, 10, 11, 13(7), 15(3), 18(8), 29, 37, 38, 39(1), 39(1)(a)(vii), (2), 41, 42, 44(1), (4), 45, 46
Courts of Judicature Act 1964 ss 3, 43, 73
E Rules of Court 2012 O 45 r 11, O 47 r 1, O 59 r 13(1)

Zamri bin Ibrahim (Zamri Ibrahim & Co) for the appellant.
Natra bt Idris (Khong Hui Li with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

F **Arik Sanusi JC:**

INTRODUCTION

G **[1]** This is an appeal by the plaintiff against the decision of this court in allowing the defendants' application for an interim stay of proceeding against the plaintiff's Originating Summons No RA-24C(ARB)-2–07 of 2020 dated 13 July 2020 which was filed pursuant to s 38 of the Arbitration Act 2005 ('Act 646').

H BACKGROUND

[2] The plaintiff has filed the originating summons (encl 1) dated 13 July 2020 for the final arbitration award between the plaintiff and the defendants
I dated 9 August 2019, be registered as a judgment of the High Court, for the recognition and enforcement of the award against the defendants. The orders prayed by the plaintiff are as follows:

1. Award Muktamad timbang tara bertarikh 09.08.2019 antara Plaintif dan Defendan-Defendan ('Award Muktamad tersebut') dijadikan Penghakiman Mahkamah Yang Mulia ini yang mengikat dan boleh dikuatkuasakan terhadap Defendan-Defendan.

2. Penghakiman Mahkamah Yang Mulia ini direkodkan mengikut terma-terma Award Muktamad tersebut dan Perintah Mahkamah Tinggi Kuala Lumpur bertarikh 14.02.2020 sebagai Defendan-Defendan bayar kepada Plaintif seperti berikut:

(i) Sejumlah RM144,730,780.00 (Ringgit Malaysia Satu Ratus Empat Puluh Empat Juta Tujuh Ratus Tiga Puluh Ribu dan Tujuh Ratus Lapan Puluh) Sahaja bagi ganti rugi kehilangan pendapatan.

(ii) Sejumlah RM1,000,000.00 (Ringgit Malaysia Satu Juta) Sahaja bagi ganti rugi teruk dan teladan.

(iii) Faedah pada kadar 5% (Lima Peratus) setahun dari keseluruhan jumlah award sebanyak RM145,730,780.00 (Ringgit Malaysia Satu Ratus Empat Puluh Lima Juta Tujuh Ratus Tiga Puluh Ribu dan Tujuh Ratus Lapan Puluh) Sahaja mulai dari tarikh Award Muktamad tersebut pada 09.08.2019 sehingga tarikh penyelesaian penuh.

3. Kos permohonan ini dibayar oleh Defendan-Defendan kepada Plaintif; dan

4. Lain-lain relief selanjutnya yang difikirkan sesuai dan manfaat oleh Mahkamah Yang Mulia ini.

[3] The originating summons is supported by the affidavit in support by Zamri bin Ibrahim (encl 2) dated 13 July 2020. In response, the defendants filed the affidavit in reply by Nur Irmawatie bt Daud (encl 8) dated 5 August 2020.

[4] However, in the course of the originating summons, the defendants filed the certificate of urgency (encl 5), the notice of application for an interim stay of proceeding (encl 4) and the affidavit in support by Nur Irmawatie bt Daud (encl 4A) which are all dated 29 July 2020.

[5] In the notice of application (encl 4), the defendants pray for the following orders:

(1) Kebenaran untuk membuat permohonan penggantungan interim ('interim stay') terhadap permohonan plaintif di bawah s 38(1) Akta Timbang Tara 2005 (selepas ini dirujuk sebagai 'Permohonan Plaintif');

(2) Suatu perintah penggantungan interim ('interim stay') terhadap Permohonan Plaintif sehinggalah permohonan ini didengar dan diputuskan;

(3) Suatu perintah penggantungan interim ('interim stay') terhadap Permohonan Plaintif sehingga pelupusan rayuan pihak Perayu-Perayu di Mahkamah Rayuan; dan

(4) Bahawa kos permohonan ini menjadi kos dalam kausa.

Alasan-alasan yang menyokong permohonan ini adalah:

1. Pada 11.3.2020, Defendan-Defendan telah memfailkan notis rayuan terhadap keputusan Mahkamah Tinggi Kuala Lumpur bertarikh 14.2.2020 yang telah menolak sebahagian daripada permohonan Defendan-Defendan untuk mengetepikan Award Penimbang Tara bertarikh 9.8.2019. Namun demikian, masih belum ada tarikh bicara ditetapkan oleh Mahkamah Rayuan berhubung rayuan tersebut.

2. Bahawa penggantungan ini amatlah penting kerana sekiranya penggantungan tidak dibenarkan, rayuan Defendan-Defendan akan menjadi sia-sia 'nugatory' serta akademik dan tidak boleh dipampas secara kos;

3. Bahawa wujudnya hal keadaan yang khas untuk suatu perintah penggantungan diberi sementara menunggu keputusan rayuan Mahkamah Rayuan;

4. Notis Permohonan ini disokong oleh Afidavit Sokongan yang diikrarkan oleh Nur Irmawatie bt Daud pada 29.7.2020 dan difailkan di sini.

[6] To support the stay application, the defendants in their affidavit in support (encl 4A) have stated the 'special circumstances' that warrant a stay of proceeding which are as follows:

10. Perintah penggantungan ini adalah perlu dan juga *wujudnya hal keadaan khas* bagi Mahkamah Yang Mulia ini menggunakan budi bicaranya untuk membenarkan perintah penggantungan atas alasan-alasan seperti berikut:

10.1 Terdapat isu undang-undang yang perlu diputuskan oleh Mahkamah Rayuan berhubung Final Award Timbang Tara bertarikh 9.8.2019 yang menjadi asas kepada rayuan tersebut dan selanjutnya akan memberikan kesan kepada Permohonan Plaintif di Mahkamah Yang Mulia ini;

10.2 Jumlah Award yang diberikan melalui Final Award Timbang Tara bertarikh 9.8.2019 adalah terlalu besar dan tinggi; dan

10.3 Pihak Plaintif-Plaintif masih menunggu tarikh rayuan perbicaraan bagi mendengar merit permohonan yang melibatkan isu 'public interest'.

11. Saya sesungguhnya percaya dan menyatakan bahawa suatu penggantungan terhadap Permohonan Plaintif ini adalah diperlukan sementara permohonan merayu didengar atas merit permohonan bagi mengekalkan kemuliaan 'integrity' rayuan tersebut.

12. Saya selanjutnya percaya dan menegaskan bahawa penggantungan ini amatlah penting kerana *sekiranya penggantungan tidak dibenarkan, rayuan Defendan-Defendan akan menjadi sia-sia 'nugatory' serta akademik dan tidak boleh dipampas secara kos*.

13. Saya sesungguhnya percaya bahawa *alasan-alasan yang diberikan di atas memenuhi beban bukti 'keadaan khas' atau 'keadaan luar biasa'*.

[7] In reply, the plaintiff filed the affidavit in reply by Zamri bin Ibrahim (encl 7) dated 5 August 2020.

[8] Upon hearing the certificate of urgency (encl 5) and the defendants' application for a stay (encl 4), this court has granted the defendants' application for an interim stay of proceeding.

THE ISSUE

[9] The issues before this court are as follows:

(a) firstly, whether the High Court can exercise its power and jurisdiction under ss 43 and 73 of the Courts of Judicature Act 1964 (Act 91) ('the CJA 1964') read together with O 45 r 11 of the Rules of Court 2012 ('the ROC') to grant an interim stay of proceeding against an application for the recognition and enforcement of an arbitration award under s 38 of the Arbitration Act 2005 (Act 646) ('the AA 2005'); and

(b) secondly, whether the special circumstances exist to warrant the defendants' application for a stay of proceeding.

THE CHRONOLOGY OF THE EVENTS AND THE SALIENT FACTS

[10] The chronology of the events and the salient facts of this case are as follows:

DATE	EVENT/DESCRIPTION
30 October 2004	Parties entered into a privatisation agreement ('the said agreement') to develop a new General Operation Force Complex in Sibu and Limbang with the contract sum of RM68,100,000 through land swap. The said agreement is conditional upon the plaintiff's fulfillment of the condition precedent stipulated in cl 2 of the said agreement. In gist, cl 2.1 of the said agreement imposes on the plaintiff the duty to acquire specified lands for the purposes of the project within a prescribed time period.
	Plaintiff and defendants engaged in arbitration proceedings.

14 February 2019	Arbitration proceedings concluded.
9 August 2019	Arbitrator issued its final award, inter alia, that: (a) the said condition precedent was waived and not binding on both parties; (b) the termination of the said agreement due to non-compliance of condition precedent is unlawful; (c) RM144,730,780 to plaintiff as claim for loss of profit due to unlawful termination of said agreement; (d) RM100,000.00 to plaintiff as miscellaneous costs incurred; (e) RM1,000,000.00 to plaintiff as punitive and exemplary damages; (f) interest on awarded sum at 5%pa.
24 October 2019	Defendants filed Originating Summons No WA-24NCC(ARB)-45–10 of 2019 in Kuala Lumpur High Court to set aside the arbitrator's final award.
14 February 2020	Kuala Lumpur High Court allowed the nominal damages for the sum of RM100,000 from the arbitrator's award to be set aside and the defendants' application to set aside arbitrator's final award was dismissed with costs of RM10,000.
11 March 2020	Defendants filed notice of appeal against the KL High Court's decision dated 14 February 2020. The Court of Appeal vide letter dated 12 March 2020 confirmed that the defendants' appeal has been registered with the case number W-01(NCC)(A)-158–03 of 2020. The defendants are awaiting a hearing date to be fixed by the Court of Appeal.
13 July 2020	Plaintiff filed Originating Summons No RA-24C-2–07 of 2020 in High Court of Kangar, Perlis to register arbitral award as a judgment of the court for the purpose of enforcement against the government ('s 38 application').
29 July 2020	defendants filed an application to stay plaintiff's s 38 application pending disposal of appeal.

THE DEFENDANTS' SUBMISSION

[11] The defendants submitted that based on ss 43 and 73 of Act 91 read together with O 45 r 11 of the ROC, the court has an absolute and unfettered discretion to grant or to refuse a stay of any decision, order or proceeding under the CJA 1964. This has been decided in *Che Wan Development Sdn Bhd v*

Co-Operative Central Bank Bhd [1989] 3 MLJ 40 and *Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor* [2015] 7 MLJ 305 where the court held that s 73 of the Act 91 gives the court the *discretionary power to grant stay of proceeding* of any order or judgment and *proceedings* pending disposal of an appeal to the Court of Appeal.

[12] It is submitted that the onus is on the applicant/defendant to demonstrate the existence of 'special circumstances' to justify the grant of a stay. In this respect, the court has consistently held that 'special circumstance' mean grounds that are special, not ordinary, common or usual and that go to the execution of the judgment and not to the validity or correctness of the judgment. The most common ground of 'special circumstances' is that the pending appeal would be rendered nugatory without the grant of a stay.

[13] The defendants further submitted that what amounts to 'special circumstances' depend on the facts of each particular case. The principles governing what would amount to special circumstances were established in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380, *Serangoon Garden Estate Ltd v Ang Keng* [1953] 1 MLJ 116, *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257, *Wilson v Church (No 2)* (1879) 12 Ch D 454, *Ong Koh Hou v Da Land Sdn Bhd & Ors* [2018] MLJU 778; [2019] 4 CLJ 622 and *See Teow Guan v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598.

[14] Based on the above authorities, the defendants submitted that there is no definitive and exhaustive list of what constitutes special circumstances. Special circumstances are dependant on the peculiar facts of each case and nugatory is one of its kind. This has been clearly reiterated in *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213.

[15] In the present case, the defendants submitted that the special circumstances that support their stay application are as stated in para 10 of encl 4A which are as follows:

(a) there are numerous issues of law arising from the arbitrator's final award on the interpretation and application of provisions in the privatization agreement and the Arbitration Act 2005 that require the determination of the Court of Appeal;

(b) the amount exceeding RM145m awarded in the arbitrator's final award to the plaintiff is eventually be paid out from the public coffers and the defendants are duty-bound to challenge the dubious grounds on which the award is premised;

(c) if monies of such a considerable sum are paid out as per the arbitrator's final award, it will then cost the government much resources and time to

recover the same from the plaintiff should they lose in the appeal; with the likelihood that the monies may not be recovered eventually;

(d) stay of execution of the order is of paramount public importance so as not to render the defendants' appeal nugatory; and

(e) the defendants had showed that the stay application is in the public interest as the amount involved is very large.

[16] Based on the abovementioned special circumstances, the defendants contended that this is a fit and proper case for this court to exercise its unfettered discretion under ss 43 and 73 of Act 91 read together with O 45 r 11 of the ROC to grant stay of proceeding against the plaintiff's originating summons in encl 1. Otherwise, the defendants' appeal which is pending in the Court of Appeal would be rendered nugatory.

[17] With regard to the issue of whether s 39(1)(a)(vii) of Act 646 as decided by the Court of Appeal in *Malaysian Bio-Xcell Sdn Bhd v Lebas Technologies Sdn Bhd* [2020] 3 MLJ 723 should be invoked in the present case, the defendants submitted that there is no necessity to invoke such provision to support the defendants' stay application. The defendants distinguished the facts and issues in *Malaysian Bio-Xcell Sdn Bhd* with the present case and submitted that the application for a stay under s 39(1)(a)(vii) of Act 646 is strictly premised on the grounds stipulated in that provision, that is to suspend the recognition and enforcement order based on the award 'not yet becoming final'.

[18] It is the defendants' contention that since there was no application filed by the appellant to set aside the final award of the first arbitration (on the termination of contract) in *Malaysian Bio-Xcell Sdn Bhd*, reliance was placed on s 39(1)(a)(vii) of Act 646 in order to stay the recognition and enforcement of the final award because there was a second arbitration (on the equipment) to which the final award in the first arbitration is subjected to, making it 'not yet binding'.

[19] However, similar situation does not arise in the present case. It is the defendants' submission that the stay application is not premised on the grounds stipulated in s 39(1)(a)(vii) of Act 646 but on the basis that the Kuala Lumpur High Court has refused to set aside the final award which is now pending appeal in the Court of Appeal. Thus, the special circumstances justifying a stay of recognition and enforcement of the final award in the present case is that the integrity of the appeal would be impinged and the appeal rendered nugatory if stay is refused.

THE PLAINTIFF'S SUBMISSION

[20] The plaintiff's contention is premised on s 8 of Act 646 which provides that 'No court shall intervene in matters governed by this Act, except where so provided in this Act'.

[21] Based on this provision, the plaintiff submitted that for arbitral matters, the powers of the court are confined to what have been provided for in the Arbitration Act 2005. This is to limit the court's intervention in matters governed by the Act. To support this contention, the plaintiff has referred to the Federal Court's decision in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417 where it was held that:

> [36] As stated in the explanatory statement to the Arbitration (Amendment) Bill 2010, (which later was passed as the 2011 Amendment), *the purpose of this provision is 'to limit court intervention to situations specifically covered by the Arbitration Act and to discourage the use of inherent powers by court'.* (Emphasis added.)

[22] The plaintiff has also referred to the Court of Appeal's decision in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697 which decides as follows:

> [16] In passing we note that *Parliament has plainly intended a strict limitation on the role of the courts when the choice of arbitration for dispute resolution has been made*. (Emphasis added.)

[23] Further, the plaintiff has relied on the judgment of the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1 which held that:

> [114] The AA 2005 is devoid of a provision in the words of s 81(2) of the UK Arbitration Act 1996. *But the AA 2005 is nonetheless clear that 'No court shall intervene in matters governed by this Act, except where so provided in this Act'*. Pertinent to 'where so provided in this Act', *the AA 2005 provides for court intervention in the matters stated in* ss 10, 11, 13(7), 15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45, and 46 of the AA 2005. 'Where a party seeks intervention is one of those situations, the court is permitted to intervene only in the manner prescribed by the model law, and *in the absence of any express provision the court must not intervene at all*. (Emphasis added.)

[24] Based on s 8 of Act 646 and the abovementioned case law, the plaintiff contended that since the court's intervention under the Arbitration Act 2005 is only allowed in matters stated in ss 10, 11, 13(7), 15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45 and 46 of Act 646, this court has no jurisdiction to stay the plaintiffs' application which is made pursuant to s 38 of Act 646.

[25] The plaintiff also submitted that the defendants' reliance on ss 43 and

A 73 of Act 91 read together with O 45 r 11 of the ROC is wrong and therefore the remedy is not available for them. It is the plaintiff's contention that s 43 of Act 91 refers to which court an application should be made, either in the High Court or the Court of Appeal and it relates to an order of the High Court. Since the plaintiff's originating summons relates to a final arbitration award which is
B made under s 38 of the Arbitration Act 2005, the said s 43 cannot be invoked against the plaintiff's application.

[26] The plaintiff further contended that under s 73 of Act 91, for an application for a stay of execution or of proceedings, the appeal must be made
C against the decision of the court. Since the defendants have appealed against the decision of the Kuala Lumpur High Court dated 12 December 2020, it is the submission of the plaintiff that the defendants should apply for a stay against the decision of the Kuala Lumpur High Court and not to stay the
D plaintiff's originating summons in encl 1.

[27] With regard to O 45 r 11 of the ROC, the plaintiff submitted that it relates to a stay of execution of the judgment or order of the court. In contrast, the plaintiff's application relates to the enforcement of the final arbitration
E award.

[28] Based on the above arguments, the plaintiff reiterates that it is wrong for the defendants to rely on ss 43 and 73 of Act 91 read together with O 45 r 11 of the ROC because those provisions refer to a stay application against the
F court's decision whereas the plaintiff's application in encl 1 relates to the arbitration award made pursuant to s 38 of the Arbitration Award 2005.

[29] As regard to the case of *Malaysian Bio-Xcell Sdn Bhd*, the plaintiff contended that the basic principle in that case is that the stay application for the
G recognition of an arbitral award must be made under s 39(1) of Act 646. The court will then decide whether it is proper to allow the application based on the circumstances, conditions and situation of the presented facts of the case. The judgment held as follows:

H > [28] ... Section 39(1)(a)(vii) read with s 39(2) confers discretion on the court hearing an application to suspend the recognition or enforcement order based on the award not yet becoming final to, in proper cases, adjourn its decision on the application for recognition or enforcement; or may even order the appellant to provide security. *How that discretion is to be exercised and what circumstances,*
I > *conditions or situation may be said to be 'proper' for the exercise of discretion of suspension is, in our mind, a matter of judicial evaluation and scrutiny having regard to all the facts and circumstances presented*. The burden of proof is on the appellant to show on a balance of probabilities that the ground is satisfied. In other words, the appellant can only approach the court to object within any of the grounds in s 39(1), *it cannot rely on any other grounds* — ... .

[30] Therefore, according to the learned plaintiff's counsel, *Malaysian Bio-Xcell Sdn Bhd* can be distinguished from the present case. The stay application was allowed by the Court of Appeal based on the facts of the case that rendered the said final award yet to become binding on the parties thus satisfying the requirement under s 39(1)(a)(vii) of Act 646.

FINDING AND DECISION OF THIS COURT

First issue

[31] The defendants have filed an application in encl 4 for an interim stay of proceeding against the plaintiff's originating summons in encl 1. It is to stay the plaintiff's application to register the arbitral award as a judgment of the court, for the recognition and enforcement of the said award against the defendants, under s 38 of Act 646. The defendants' application is made pursuant to ss 43 and 73 of Act 91 read together with O 45 r 11 of the ROC.

[32] For ease of reference, the provisions read as follows:

(a) s 43 of Act 91:

> *Applications*
>
> Wherever application may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court.

(b) s 73 of Act 91:

> *Appeal not to operate as stay of execution*
>
> An appeal shall not operate as *a stay of execution or of proceedings under the decision appealed from* unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

(c) O 45 r 11 of the ROC:

> 11. *Matters occurring after judgment: Stay of execution* (O 45 r 11)
>
> Without prejudice to O 47 r 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the *judgment* or *order* or *other relief* on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks fit.

[33] The plaintiff on the other hand submitted that according to s 8 of Act 646 and the case of *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* , *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* and *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* , the court shall not intervene in matters governed by the Arbitration Act 2005

except with regard to ss 10, 11, 13(7), 15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45 and 46 of Act 646.

[34] Section 8 of Act 646 provides as follows:

> No court shall intervene in matters governed by this Act, except where so provided in this Act.

[35] Since s 38 of Act 646 is not mentioned in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* as an exception where the court shall intervene under the Arbitration Act 2005, the plaintiff submitted that this court has no jurisdiction either under the CJA 1964 or the Arbitration Act 2005, to stay the plaintiffs' application which is made under the impugned provision.

[36] However, upon careful consideration of s 8 of Act 646, the purpose of the enactment of the Arbitration Act 2005 and the facts and issues that arose in *Far East Holdings Bhd & Anor*, with respect to the learned plaintiff's counsel, this court is of the considered view that the principle of the court's non-intervention in an arbitration proceeding and the Arbitration Act 2005 that has been laid down in *Far East Holdings Bhd & Anor* is not applicable to the present case. This is because the plaintiff's application for the registration of the final award under s 8 of Act 646 as in encl 1 is not subject to the arbitration proceeding and governed by the Arbitration Act 2005, but is a matter that is subject to the court 'proceeding' and governed by the CJA 1964. In this respect, a 'proceeding' for the purpose of the CJA 1964 has been defined under s 3 of Act 91 to mean as follows:

> 'proceeding' is defined to mean *any proceeding whatsoever of a civil* or criminal nature and *includes an application at any stage of a proceeding*;

[37] Based on this statutory interpretation, by filing the application in this court, it is the finding of this court that the plaintiff's application in encl 1 and the defendants' application in encl 4 would fall within the meaning of 'proceeding' under s 3 of Act 91. Hence, this court would assume jurisdiction over the matters.

[38] Further, since the defendants' stay application of proceeding is against the decision of the Kuala Lumpur High Court dated 14 February 2020, which form the basis of the plaintiff's application in encl 1, which is now pending before the Court of Appeal, this court agrees with the submission of the learned defendants' counsel that ss 43 and 73 of Act 91 read together with O 45 r 11 of the ROC clearly grant the power and jurisdiction to this court to hear the defendants' stay application in encl 4.

[39] It is the finding of this court too that by virtue of s 73 of Act 91, the High Court has an absolute and unfettered discretion *to grant a stay of execution or of proceedings* against *any decision, judgment or order* of the court pending disposal of an appeal to the Court of Appeal. The discretion, however, is subject to some guiding principles and rules that have been established by the court.

[40] In *Syarikat Berpakat v Lim Kai Kok* [1983] 1 MLJ 406, Hashim Yeop A Sani J (as he then was) in a similar vein has stated as follows:

> The law on the granting of an order for stay of execution has been examined a number of times in the courts of this country. *It is trite law that the court has an absolute and unfettered discretion to grant or refuse an application for stay*. As a rule the court will however only grant stay if there are special circumstances and which circumstances must be deposed in the affidavit supporting the application. (Emphasis added.)

[41] Further, in the case of *Che Wan Development Sdn Bhd v Co-Operative Central Bank Bhd* , NH Chan J has ruled as follows:

> *An appeal does not operate as a stay of execution*. See s 73 of the Courts of Judicature Act 1964 (Rev 1972) which reads:
>
> > 73 An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Supreme Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Supreme Court may direct.
>
> This is similar to the provisions of the English RSC O 59 r 13(1). See also 17 *Halsbury's Laws of England* (4th Ed) para 454 at p 272 which reads:
>
> > Except so far as the court below or the Court of Appeal may otherwise direct, an appeal does not operate as a stay of execution or of proceedings under the decision of the court below, and no intermediate act or proceeding is invalidated by an appeal.
>
> This is what *Halsbury's Laws of England* says on the effect of the English O 59 r 13(1): (4th Ed) Vol 17 at p 272, para 455:
>
> > *The court has an absolute and unfettered discretion as to the granting or refusing of a stay*, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.
>
> ...
>
> In this country, the words in s 73 of the Courts of Judicature Act 1964 are, *'unless the court ... so orders'. Plainly, this gives a discretion to the court. A judicial discretion, no doubt, which must be guided by proper rules founded on principle*. (Emphasis added.)

[42] On the same issue, in the case of *Universal Trustee (M) Bhd v Lambang*

Pertama Sdn Bhd & Anor, Wong Kian Kheong JC held that:

> (1) Section 73 of the Courts of Judicature Act 1964 and r 13 of the Rules of the Court of Appeal 1994 *provide the statutory jurisdiction for the High Court* and Court of Appeal *to stay execution of any order or judgment and proceedings pending disposal of an appeal to the Court of Appeal*. Stay of execution and stay of proceedings pending appeal to Court of Appeal should be the exception and not the norm. *As there are clear statutory provisions conferring an exceptional jurisdiction on the High Court* and Court of Appeal *to stay execution and to stay proceedings pending appeal to the Court of Appeal, there is no need to resort to the court's inherent jurisdiction* (see paras 11–13 & 15–16).
>
> (2) Case law does not distinguish stay of execution from stay of proceedings.
>
> *Case law requires both the applicants for stay of execution and stay of proceedings to show 'special circumstances' to justify a stay* (see paras 21–22). (Emphasis added.)

[43] In the circumstances, it is the considered view of this court that, according to s 73 of Act 91, the court has an absolute and unfettered discretion to grant or to refuse the defendants' stay application against the plaintiff's application under s 38 of Act 646. The discretion, however, must be exercised in accordance with the established judicial principles.

[44] Therefore, this court answers the first issue in the affirmative.

[45] With regard to the case of *Malaysian Bio-Xcell Sdn Bhd* , the case law was submitted by the defendants by way of supplementary submission at the request of this court, for both parties to furnish case law that has decided on similar issue as in the present case. Except *Malaysian Bio-Xcell Sdn Bhd*, no other cases were submitted by both parties.

[46] Having examined the facts and issues in *Malaysian Bio-Xcell Sdn Bhd*, this court is of the opinion that the case can be distinguished with the present case. In *Malaysian Bio-Xcell Sdn Bhd* , the stay application is made under s 39(1)(a)(vii) of Act 646 because the award *has not yet become binding* on the parties, whereas in the present case, the defendants' stay application is made pursuant to ss 43 and 73 of Act 91 read together with O 45 r 11 of the ROC against the plaintiff's application for the recognition and enforcement of the *final arbitration award* under s 38 of Act 646. Thus, there is no issue of 'the award has not yet become binding on the parties' as decided in *Malaysian Bio-Xcell Sdn Bhd* , in the present case.

[47] Since the defendants and the plaintiff are not relying on s 39(1)(a)(vii) of Act 646 in the present case, and the facts and issues in *Malaysian Bio-Xcell*

Sdn Bhd are not similar to the present case, this court will not discuss this case further.

Second issue

[48] With regard to the second issue, it is trite that for an applicant to succeed in an application for a stay of execution or of proceedings, he must show special circumstances in the affidavit supporting the application, that warrant the stay application. The principle of special circumstances has been established and elucidated in a number of cases. The cases, however, suggest that there is no definitive and exhaustive list what constitutes special circumstance. It depends on the facts of each case.

[49] In this regard, the superior courts have laid down several factors and principles that could guide the courts in determining what amount to special circumstances, as it forms the basis for the granting or refusing the application for a stay.

[50] In an earlier case of *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86, Raja Azlan Shah J (as he then was) has decided that the court has an absolute discretion to grant or refuse a stay. In granting the stay application, the applicant must show the special circumstances in his affidavit in support. His Lordship held as follows:

> *Although the court has an unqualified discretion to grant a stay it has never been the practice to do so unless it is supported by an affidavit of special circumstances*. The law on the point is well settled. I quote a passage from *Halsbury's Laws of England* (3rd Ed) Vol 16, para 51 at p 35:
>
> > The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.
>
> I would also adopt a passage in Mallal's Supreme Court Practice at p 573 where the learned author said:
>
> A stay will not be allowed unless there are special circumstances. (Emphasis added.)

[51] The principle of special circumstances has also been considered in the case of *Syarikat Berpakat v Lim Kai Kok* where Hashim Yeop A Sani J held that:

> Held: as a rule *the court will only grant a stay if there are special circumstances*. In this case no special circumstances had been shown to justify a stay. (Emphasis added.)

[52] In *Che Wan Development Sdn Bhd v Co-Operative Central Bank Bhd* , NH Chan J has also considered the principle of special circumstances in

granting or refusing the stay application which is as follows:

> Put shortly, it is this: that *the court has a discretion as to the granting or refusing of a stay of execution pending appeal and that as a rule it will only grant a stay if there are special circumstances*, which circumstances must be deposed to on the affidavit supporting the application. (Emphasis added.)

[53] In the abovementioned case law, the courts have considered special circumstances as a ground to grant stay of execution or of proceedings and it must be supported by an affidavit supporting the application.

[54] In the case of *The 'Yih Shen': Lai Lai Yin v MV 'Yih Shen', Owners Of And Other Persons Interested* [1986] 2 MLJ 65, apart from the special circumstances factor, Mohamed Dzaiddin J (as he then was) has considered the factor of 'the appeal, if successful, is not nugatory' in determining the applicant's stay application. In his judgment, His Lordship held as follows:

> This is a case where *the court has an absolute and unfettered discretion to grant or refuse the stay*. *Halsbury's Laws of England* (4th Ed) Vol 17 para 455 states as follows:
>
> > The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.
>
> Thus, *it is incumbent upon the defendant in this case to show from the affidavit the special circumstances to enable this court to grant a stay of execution*. Examples of 'special circumstances' are many and are enumerated at the footnote of Halsbury's Laws. However, the leading authority relied upon by the defendant is *Wilson v Church (No 2)* where Cotton LJ laid down the principle at p 458 '... *when a party is appealing, exercising his undoubted right to appeal, this court ought to see that the appeal, if successful, is not nugatory*.' This principle was applied in *Orion Property Trust Ltd v Du Cane Court Ltd* ; and in the local case of *Re Kong Thai Sawmill (Miri) Sdn Bhd*. (Emphasis added)

[55] The Court of Appeal in *Gentali (M) Sdn Bhd lwn Kawasaki Sunrock Sdn Bhd* [1996] 3 MLJ 597 has also considered whether the appellant's appeal will become nugatory as a ground to grant stay application. In his judgment, Ahmad Fairuz HMR (as he then was) held as follows:

> In an application for a stay of execution, one of the deciding factors that should be considered is *whether the appellant's appeal, if successful, will become nugatory because the order to stay is not given to him* — nugatory in the sense that the appellant is deprived of the fruits of his success (see p 602F); *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126 followed. (Emphasis added.)

[56] Similar approach was followed by Abdul Malik Ishak J in *All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held*

Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v Punca Klasik Sdn Bhd [1996] 4 MLJ 533; [1998] 5 CLJ 49 where His Lordship has clarified as follows:

> With respect, See Teow Guan did not consider the Federal Court cases of *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105; [1995] 2 CLJ 701 (FC) and *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119; [1995] 3 CLJ 161 (FC). *These two authorities* from the highest court in the country, *in no uncertain terms, entrenched the special circumstances approach in the context of a stay of execution of a judgment* and, I may add, a fortiori it must also be extended *to apply to an application for a stay proceedings in order to preserve the integrity of an appeal*. (Emphasis added.)

[57] The factors of special circumstances and the appeal will become nugatory have also been explained coherently by Mahadev Shankar JCA in *Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin* [2000] 5 MLJ 391; [1999] 8 CLJ 534 where His Lordship held that:

> All the authorities have been reviewed by my brother NH Chan J in *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 3 MLJ 40; [1989] 2 CLJ 584; [1989] 1 CLJ Rep 366, except the following:
>
> (1) *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126;
>
> (2) *Orion Property Trust & Ors v Du Cane Court Ltd* [1962] 3 All ER 466;
>
> (3) *Lee Kuan Yew v Jeyaretnam JB* [1991] 1 MLJ 83.
>
> The core factors in this equation which emerge from these cases can be summarised as follows:
>
> (1) The court will not deprive the successful party of the fruits of his litigation until an appeal is determined *unless the unsuccessful party can show special circumstances otherwise*;
>
> (2) The validity or correctness of the decision appealed from are not special circumstances;
>
> (3) Special circumstances are circumstances which go to the enforcement of the judgment and not those which go to its validity or correctness. Merits or strong grounds of appeal are not special circumstances;
>
> (4) *Proof that a successful appeal would be nugatory is a special circumstance*. (Emphasis added.)

[58] Further, in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* , Abdul Hamid Mohamad JCA (as he then was) has also approved the principle of special circumstances and the appeal will be rendered nugatory, to be considered by the court in granting or refusing the application for a stay. In his judgment, His Lordship has lucidly explained as follows:

> *Serangoon Garden Estate Ltd v Ang Keng* [1953] 1 MLJ 116, though only a

judgment of the High Court (Singapore), is perhaps the most quoted case on the subject.

...

The following points emerge from that judgment:

(1) *granting a stay pending appeal is an exercise of discretion*;

(2) there is no rule of practice limiting the exercise of discretion;

(3) it is a clear principle that the court will not deprive a successful party of the fruits of his litigation until the appeal is determined *unless there are special circumstances*;

(4) the ground that, if the defendant is successful in his appeal, he cannot be restored to the same position as before, standing alone, is not a sufficient ground on which to grant a stay, *however, it is 'an important factor' to take into consideration*, if there are other grounds, for example *merit of the appeal. Both grounds, together, may well amount to 'special circumstances* ...

...

Mohamed Mustafa v Kandasami (No 2) [1979] 2 MLJ 126 is a judgment of the Federal Court consisting of Lee Hun Hoe CJ (Borneo), Wan Suleiman FJ and Abdul Hamid J (as he then was). It was an application for leave to appeal to the Yang DiPertuan Agong and for a stay of execution. *The court granted both applications, the stay being granted 'to maintain status quo'.*

The judgment of the court was delivered by Abdul Hamid J (as he then was). On the question of stay this is what the learned judge (as he then was) said:

> On the question of stay of execution it is I think settled law that *the granting of such a stay is a matter of the court's discretion, and it is true that the exercise of such discretion must be founded upon established judicial principles. One of the determining factors* that call for consideration is whether by not making an order to stay of the execution it would make *the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal.* How pertinent that *factor would be may vary according to the circumstances of each particular case.* (Emphasis added.)

[59] The principles of stay application have also been discussed by the Federal Court in a landmark case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* . In this case, the Federal Court ruled that the existence of special circumstances and the appeal will become nugatory are among factors to be considered by the court in granting a stay application. In his judgment, Augustine Paul JCA has stated that:

> *The need to establish the existence of special circumstances to enable the court to grant a stay of execution has been well-established in this country* (see, for example, the Federal Court cases of *Re Kong Thai Sawmill (Miri) Sdn Bhd, Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131; *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 and *Kerajaan Malaysia v Dato' Hj Ghani*

Gilong [1995] 2 MLJ 119).

...

The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v Lim Kai Kok* [1983] 1 MLJ 406). *Where it is alleged that there is a danger of the unsuccessful party not being repaid if its appeal is successful* for any reason like, for instance, the insolvency of the other party, *this must be shown in the affidavit* (see The Annot Lyle (1886) 11 PD 114).

[60] Following the Federal Court's decision in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* , in the case of *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* , Zawawi Salleh JCA (as he then was) has explicitly set out the principles of stay proceedings as follows:

PRINCIPLES OF STAY PROCEEDINGS

[22] Now, what factors or principles will, and should, guide the courts in applications for a stay of an order granted by a court. These factors or principles have been reiterated in very many of cases decided by our courts. *The factors or principles so enumerated are inexhaustive*, and not all of them are applicable to every case. Each has its own peculiar principle. Some of the principles to be considered in the motions may be stated as follows:

(a) *the courts have an unimpeded discretion to grant or refuse stay.* In this, like in all other instances of discretion, the court is bound to exercise that discretion both judicially as well as judiciously and not erratically (see *Serangoon Garden Estate Ltd v Ang Keng* [1953] 1 MLJ 116; *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86);

(b) *an unsuccessful party applying for a stay must show 'special circumstances'. What will constitute 'special circumstances' will no doubt vary from case to case. The fact that an appeal would be rendered nugatory if stay was refused is the most common one* (see *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 and *Re Kong Thai Sawmill (Miri) Sdn Bhd, Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131). The application is not granted as a matter of routine and it is not an automatic or mechanical relief slavishly followed after filing an appeal. In every matter or suit before a court of law, whether in its original or appellate stage of proceedings, the court will consider the competing rights of both parties including the applicant and respondent to justice;

(c) there is a need to preserve the res or preservation of the subject matter of litigation. *The courts have an obligation to protect the res for the purpose of ensuring that the appeal, if successful, will not be rendered nugatory* (see *Erinford Properties Ltd and another v Cheshire County Council* [1974] 2 WLR 749). But where it is shown by affidavit evidence, say by the respondent, that the res will not be destroyed or there is in fact no res, an

application may not be granted ... . (Emphasis Added.)

[61] Based on the above authorities, it is plain and clear that in granting or refusing the stay application, the court has to take into account among others, the factors of special circumstances and an appeal would be rendered nugatory if the stay is refused.

[62] In the present case, having examined the defendants' application in encl 4 and the affidavit in support in encl 4A, this court finds that there are merits in the defendants' application and the defendants have successfully shown the special circumstances in their affidavit in support to justify the stay of proceeding, which are as follows:

(a) the defendants have filed an appeal against the Kuala Lumpur High Court's decision dated 14 February 2020 in dismissing the defendants' application to set aside the arbitrator's final award vide the Originating Summons No WA-24NCC(ARB)-45–10 of 2019;

(b) the defendants' appeal against the final arbitration award is now pending before the Court of Appeal;

(c) the appeal would be rendered nugatory, if the stay is refused and the defendants' appeal is successful;

(d) there are numerous legal issues arising from the arbitrator's final award that require the determination of the Court of Appeal;

(e) the amount of the final award which is exceeding RM145m will be paid out from the public coffers. It will cost the government much resources and time to recover the final award from the plaintiff should the plaintiff lose in the appeal;

(f) stay of execution of the order is of paramount public importance so as not to render the defendants' appeal nugatory; and

(g) the stay application is in the public interest as the amount involved is very large.

[63] Since the defendants have successfully shown the special circumstances that justify the stay application, in particular, that the appeal will become nugatory, and have fulfilled the principles of stay application, based on the discretionary power under s 73 of Act 91 and the guiding principles that have been established in the aforesaid cases, this court has granted the defendants' application for an interim stay of proceeding (encl 4) against the plaintiff's originating summons (encl 1) which was filed under s 38 of Act 646.

[64] Hence, this court answers the second issue in the affirmative.

CONCLUSION

[65] Having considered the above authorities and the principles of stay application, it is the finding of this court that:

(a) with regard to the first issue, this court has an absolute and unfettered discretion under ss 43 and 73 of Act 91 read together with O 45 r 11 of the ROC to grant the defendants' application for a stay of proceeding against the plaintiff's originating summons in encl 1 which is made pursuant to s 38 of Act 646; and

(b) with regard to the second issue, the defendants have successfully established the special circumstances that justify the stay application in the affidavit supporting the application (encl 4A).

[66] Therefore, the defendants' application for a stay of proceeding in encl 4 pending disposal of the appeal at the Court of Appeal, is allowed with no order as to cost, as agreed by both parties.

Enclosure 4 allowed with no order as to costs.

Reported by Dzulqarnain bin Ab Fatar